FILED
JUL 11 2008
OFFICE OF THE CLERK
SUPREME COURT, U.S.

No. 07-1533

IN THE

United States Supreme Court

YAAKOV KANOVSKY,

Petitioner,

v.

MONTEFIORE MEDICAL CENTER and
FRANK VEITH, M.D.,

Respondents.

On Petition For A Writ of Certiorari to the Supreme Court, Appellate Division Second Department of New York

BRIEF IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI

Timothy J. O'Shaughnessy
MCALOON & FRIEDMAN, P.C.
Attorneys for Respondents
123 William Street, 25th Floor
New York, New York 10038
(212) 732-8700

QUESTION PRESENTED

Was any right of plaintiff under the due process clause violated in the course of his action for medical malpractice in State Court?

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BRIEF IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI

Respondents Montefiore Medical Center and Frank Veith, M.D., defendants in the medical malpractice action in the New York State Courts, respectfully submit this brief in opposition to the petition.

STATEMENT OF THE CASE

Petitioner brought an action for medical malpractice against respondents. Respondents moved for summary judgment and plaintiff opposed the motion and cross-moved. The trial court, which was the Supreme Court of the State of New York, County of Kings, granted respondent's motion for summary judgment and denied petitioner's cross-motion by order without opinion dated April 20, 2005. It is undisputed that petitioner failed to appear for oral argument on the return date.

Petitioner moved for an order vacating the order of April 20, 2005, which he claimed was based on his default in appearance on that date (Petition at 4a, 5a). That motion was denied (Petition at 3a-12a).

Petitioner appealed as of right to New York's intermediate appellate court, which is the Appellate Division of the Supreme Court, in this case the Appellate Division for the First Judicial Department. That court affirmed, pointing out that the

April 20, 2005 order was issued on the merits and not on default (Petition at 2a).

Petitioner moved in the New York Court of Appeals, which is New York's highest court, for leave to appeal to it. The motion was dismissed on the ground that the order sought to be reviewed did not finally determine the action (Petition at 14a). The Court so ruled because both the New York Constitution and the New York Civil Practice Law and Rules permit the Court of Appeals to grant leave to appeal in a civil case only if the order to be reviewed was the final order in the case. NY Const art VI, sec 3, cl b(6), *cf. id.* cl b(4); NY CPLR 5602(a)(1). The Court undoubtedly viewed the order granting respondents summary judgment to be the final order in the case, rather than the order denying petitioner's motion to vacate.

Petitioner moved in the Court of Appeals for reargument of his motion for leave to appeal but that motion was denied (Petition at 15a). Petitioner now seeks moves a writ of *certiorari*, arguing that his due process rights were violated.

REASONS FOR DENYING THE PETITION

Assuming without deciding that the award of summary judgment was a deprivation of some constitutionally-protected right of petitioner, petitioner had several adequate post-deprivation remedies. He could have appealed as of right from the order. NY CPLR 5701(a)(2)(iv) & (v). He could have moved for reargument before the same justice who

decided the motion. NY CPLR 2221(d). If he felt that he had evidence that he did not present in opposition to the motion, and that he had a reasonable excuse for not submitting the evidence on the motion, he could have moved for renewal. NY CPLR 2221(e). His motion for vacatur of the order probably is best understood as a motion for renewal.

Petitioner had the same post-deprivation remedies available to him when his motion for relief from the April 20, 2005 order was denied. After exercising his right to an appeal, but losing in the Appellate Division, petitioner also had available the remedy of a motion for permission to appeal to the Court to be made in the Appellate Division, but he did not avail himself of this possible avenue of relief. NY CPLR 5602(b)(1).

As to substantive due process, we respectfully submit that finding in the Supreme Court decision on the motion to vacate that petitioner had not shown merit to his action demonstrates that there was no substantive due process violation (Petition at 11a-12a).

CONCLUSION

For the reasons stated above, the petition for a writ of *certiorari* should be denied.

Respectfully submitted,

Timothy J. O'Shaughnessy
McALOON & FRIEDMAN, P.C.
Attorneys for Respondents
123 William Street, 25th Floor
New York, New York 10038
(212) 732-8700

Dated: New York, New York
July 11, 2008